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Opening

Mr. Chairman and distinguished members of the committee: I am honored to appear before you today to speak about my experiences with the Employer Support of the Guard and Reserve in regards to helping other service members understand their resource options and rights under the Uniform Services Employment and Reemployment Act (USERRA). I am pleased to be accompanied at today's hearing by my wife, Mary Duarte, my daughter, Danielle Duarte, my mother, Erla Duarte and my father, a former United States Marine who fought in Korea, Joe Duarte.

More than anytime since WWII, the United States armed forces are relying on National Guard Members and Reservists to carry out their missions. Since September 11th, greater than one half million Reservists and National Guard members have dutifully left their civilian jobs and families and risked their lives alongside active duty troops. I was one of those Reservists and I am here to relate my personal experience with regard to the transition from military duty to civilian life.

Many of our troops have assimilated back into the civilian world with family and careers which were interrupted while they were called upon to do the work of the country. However, thousands of others like me, have returned home to problems with our civilian employers. Employment problems that have included: demotion, loss of pay and benefits, and even flat-out firings—as happened to me.

Military Background

I was a United States Marine for 29 years. I was commissioned a Second Lieutenant in the United States Marine Corps in April 1977. I served on active duty until April 1980 as a Marine Artillery Officer. I became a Marine Reservists in September 1980 and maintained this status until called to Active duty following the attacks on the World Trade Center in September 2001. From October 2001 to April 2002, I was activated in the capacity of a Marine Liaison Officer assigned to the Joint Force Command in Norfolk, Virginia. From November 2002 to July 2003, I was activated in the capacity as

a Marine Advisor to the Navy Seabees operating in Kuwait and Iraq during Operation Iraq Freedom. From June 2005 to March 2006 I was activated and assigned duties as the Senior Operation Office in the Fourth Marine Division Command Operations Center in New Orleans, Louisiana, prior to, during and after Hurricane Katrina. I retired from the Marine Reserves in March of 2006.

Civilian Background

Concurrent with my service in the Marine Corps., I have remained employed in the private sector. From April 1980 to October 1984 I was employed by Texas Instruments as a Manufacturing Supervisor. From November 1984 to November 1999 2003, I was employed by Hewlett-Packard as a Human Resource Generalist performing such functions as Compensation, Recruiting, Training and Organizational Development issues. In November 1999, Agilent Technologies, Inc. was spun off from HP. As a long term HP employee, all my seniority rights continued with me in my move to this new spin off company. I was primarily assigned duties as a Senior Design Consultant for Sales, in the Corporate Compensation department.

Agilent Technologies is the company which fired me in November of 2003. I returned from Operation Iraq Freedom in July 2003 and on November 10th, 2003, the 228th Birthday of the U.S. Marines, I was told by my manager that I was being fired.

My Options

In 1994 Congress passed the Uniformed Services Employment and Reemployment Rights Act, or USERRA. My understanding is that at least part of the rational behind the law is that when the nation goes to war, everyone should share in the responsibility and not just the men and women on the front lines.

Prior to my active duty assignments following September 11th, 2001, I was briefed on USERRA as a law that was supposed to protect Reservists rights. I understood USERRA guaranteed service members their civilian jobs back upon their return and that it included both public and private sector employers. Returning Service members were guaranteed re-employment for at least six or twelve months, depending on the length of deployment.

At the time of my firing from Agilent Technologies, Inc. in November 2003, my options were readily apparent and I felt confident with the knowledge that there were laws written to protect deployed personnel and government agencies specifically chartered to support these laws. Given the patriotic wave of support throughout this country since 9/11, I felt confident in that the USERRA law, the government agencies or the company I worked for 19 years would somehow support my deployment in the defense of our country and allow me to resume a previously successful career.

I communicated directly with the highest levels of management within Agilent Technologies, Inc.. I contacted the ESGR immediately when I received the word from Agilent that USERRA did not prevent them from letting me go. I contacted the

Department of Labor (VETS) as instructed by ESGR. Having failed in my communications with my company and getting no help from two government agencies, I hired private counsel.

Employer Support of the Guard and Reserve (ESGR)

I understood ESGR's mission to ensure that public and private employers support the men and women of the National Guard and Reserve. It is their volunteer "ombudsmen" who are tasked with preventing, resolving, or reducing employer and employee problems and misunderstandings that result from National Guard or Reserve service by providing information regarding USERRA, informal investigations and informal mediation.

During deployment briefings, troops are reminded of their USERRA rights and advised that if they have trouble with their civilian employers, they should contact the local ESGR office. Military Reservists and Guard Members are briefed and encouraged to first turn to the Employer Support of the Guard and Reserve (ESGR). My understanding as a Marine Officer was that the ESGR would be my advocate to discuss any violations of USERRA.

Job Loss from Agilent

My job firing was orchestrated by three individuals with absolutely no regard for USERRA or my military situation or for that matter, my performance in that civilian job. Actually, they regarded the law only enough to scheme around it. One of these individuals sat within a short walking distance in the same building from the top leadership of this 28,000 plus employee organization. The leaders I speak of here are the CEO Ned Barnholdt and the Vice President of Human Resources and highest ranking Human Resources member, Jean Halloran, both of who were visibly absent during the entire process. Both were addressees on e-mails sent directly to them and neither responded, apparently choosing to keep their heads buried in the sand and refusing to acknowledge the 14 month legal proceedings. They failed to acknowledge from even a patriotic perspective knowing this country was at war and single member of the Agilent organization was questioning his military labor law rights through USERRA. The total lack of leadership at the highest levels of this organization and the total lack of management checks and balances for a multibillion dollar organization for labor laws like USERRA suggest that their business needs and financial priorities were much greater than the needs of this country.

The three individuals who orchestrated this violation of law and my firing relied on a scheme they cooked up from a program known to Agilent Managers as "Workforce Management", a euphemism for firing employees! The Workforce Management program had been used by Agilent Technologies over the preceding four years, to lay off 12,000 plus employees. This program, prior to my firing in November 2003, had never been used to lay off an employee who had been activated to military service with rights under USERRA.

The Workforce Management program was a management tool used by Agilent Technologies to effectively eliminate positions. Since their spin off from Hewlett-Packard in November 1999, Agilent Technologies had essentially reduces their workforce from forty thousand plus employees to approximately twenty eight thousand employees at the time of my release from the company in November 2003, a period of four years. This workforce program, utilized for eliminating employees, had apparently survived the labor laws for the release of minorities, women, older employees or other employees in protected classes, but it had never been utilized to eliminate a USERRA protected employee.

The Workforce Management program had two primary selection criteria for managers to select from in targeting employees for termination. The primary selection criteria were if the employee was involved in programs, projects, or other work slated for elimination. The secondary selection criteria were for such things as process improvement, excess capacity or restructuring. For these secondary criteria, managers were asked to list the future essential job functions, analyze the future business needs and evaluate the individual critical skills for each employee.

After my return to Agilent Technologies from Operation Iraq Freedom in July of 2003, I was not given the position I held prior to my deployment. My manager, Bruner had stepped down from her management position and filled my position within the organization. My new manager, Groniga, assigned me to a special project. Unknown to me, this particular project is slated to be eliminated and because the project is ended three months after being assigned to me, the first selection criterion for the Workforce Management program is met. Concurrent with this project assignment, Bruner was asked to complete a performance evaluation on me based on four months observation (prior to my deployment) and to also complete a skills assessment on me. Bruner writes a performance evaluation that identifies many areas for improvement—this was substantially different then my two previous evaluations written by two separate managers. Those were glowing. Bruner also conducts a “critical skills assessment” and scores me significantly low and was ultimately reviewed and approved by Groniga. After nearly two decades with this organization (Hewlett-Packard and Agilent Technologies), my skills are now rated as significantly diminished and degraded. Suddenly the company saw me as if I were a different, unqualified person.

On November 10, 2003, I was told by Groniga that I am being selected for “Workforce Management” because the project I am working is going away. After almost two decades with this organization, I was told I have one week to clean out my desk and my last day would be November 17, 2003. It was after this phone conversation with Groniga that I contact my Commanding Officer, Colonel Aucoin, who advises me to send a communication to Agilent Technologies that they are in violation of USERRA. On November 12th, I sent an e-mail directly to Jean Halloran (VP of HR for Agilent Technologies, and copy the CEO, Groniga, Bruner, Juskie, and several other managers. The following is an excerpt from this e-mail communication:

As a member of HP and Agilent HR workforce for 19 plus years, I understand the companies need to manage it's workforce. If you proceed with the process to end my employment with Agilent, you will be in violation of Federal Law; 38 U.S. Code 4316(C) 4317(C) (USERRA).

Within 24 hours after sending my e-mail to Agilent officials, I received an e-mail reply on November 13th, from Steve Rimmel (Agilent Group Human Resources Manager), the following is an excerpt from that response:

We have reviewed the concerns expressed in your memo. We have concluded that USERRA does not prohibit us from selecting you as a participant in Agilent's Workforce Management Program.

In less than twenty four hours or one business day, Agilent Technologies, Inc. is totally knowledgeable and completely confident in their assessment of USERRA, and that this fairly new labor law with little case law support does not prevent them from letting me go.

First Contact with ESGR

I first contacted the ESGR on November 13, 2003. I briefly explained my deployment history, timeline of events and my pending termination. Without and further comments, questions or discussion, I was immediately referred to the Department of Labor. The ESGR contact did not offer me any guidance regarding an informal investigation they might conduct with Agilent Technologies. The ESGR contact did not mention anything related to any mediation they might conduct. The ESGR contact offered no guidance or training related to USERRA. The ESGR contact did not relate any process that I should follow except to contact the Department of Labor.

The ESGR Ombudsman was completely ineffective to my firing in November 2003. A situation where my employer raised many flags and would eventually be found in violation of USERRA and obvious misconduct. The ESGR Ombudsman offered no research to any potential USERRA violations and never volunteered to conduct an informal investigation. The ESGR made no attempt whatsoever to review my potential USERRA situation and never offered mediation or suggestion to contact Agilent for additional information.

Contact with Department of Labor

The ESGR Ombudsman I spoke to on November 13th, gave me a phone number to call when he referred me to the Department of Labor. I called this number (303-844-2151) on November 13th and received a recorded message for a Mark McGinty, whereby I left my name and number on his voice mail. This phone number was for an organization known as the Veterans Employment and Training Services (VETS). I received no return call

from Mr. McGinty and on the next day I tried the phone number again. This time I was connected with Teresa Arney, a VETS Program Assistant, who spoke to me in person. Again, I briefly explained my deployment history, timeline of events and my pending termination. I also explained that I was referred to this number by an Ombudsman with the ESGR. She was quick to tell me that if I did not hear someone at Agilent Technologies tell me that they were "terminating me for military reasons", that I did not have a USERRA case.

Joseph Steve Duarte v. Agilent Technologies, Inc..

The case, Civil Action No. 04-B-0298 Mag. Div. (CBS), was filed in U.S. District Court for the District of Colorado. After continued discussions and consultations with Colonel Aucoin and having not heard any responses from the ESGR or Department of Labor, I filed this suit in February 2004.

In my professional Human Resources history with both Hewlett-Packard and Agilent Technologies, whenever an employee filed a law suit against the company, internal counsel would attempt to get the case dismissed through Summary Judgment. If the case was not dismissed, then outside counsel would be retained to handle the case. In my particular situation, after I made my filing in U.S. District Court, Agilent Technologies immediately hired one of the largest law firms in Colorado to defend them. They hired the Denver law firm of Holland & Hart LLP.

I retained my Commanding Officer, fellow Marine and Civilian Attorney George Aucoin. With limited financial resources and little case law history we attempted to find out if USERRA had teeth. The loss of my livelihood, the support for my family and a career change at age 51 were on the line, along with the fact that many thousands of troops would return home to potentially the same situation. At the time, I surmised that many of these returning Reservists and Guard Members would be pushed aside by the ESGR with the same response I was given. Many others might receive the same information by VTES and the Department of Labor. Many younger Privates, Airman, Lance Corporals, Sailors or Sergeants might not have the time, resources or wherewithal to fight or question wrongful terminations or job status changes. Many would possibly take a small or no severance package and move on in the interest of continued support to there families.

Agilent Technologies attorney's pursued a multi pronged approach to discredit me through several avenues:

1. My old manager Bruner writes a Performance Appraisal with low marks. Two previous managers on two separate appraisals mark me as having acceptable performance.
2. My new manager Groninga assigns me to a special project upon my return from Operation Iraqi Freedom. She alone cancels the project which is the number one criteria for the Workforce Management program allowing for the termination.

3. My old manager Brunner, along with my new manager Groninga complete a critical skills assessment on me. They are the only two to score and evaluate the test which is the secondary reason for Workforce Management.
4. My new manager Groninga states that my job has been eliminated through a restructuring program. My exact position, verbatim, is posted on an external web site three months after I was released.
5. Agilent's attorneys suggest that my termination was justified due to financial strain that Agilent Technologies was experiencing. During the fiscal quarter in which I was let go, Agilent Technologies gave bonus money back to the employees in the amount of 12 -13 million dollars. I myself received \$500. Agilent Technologies makes significantly more money in the year to follow.
6. Agilent's attorney's, looking for a defense; ask me to sign a release for my medical records, previous income filings, military records and criminal background. They apparently find nothing they can use.
7. Agilent's attorneys accuse me of not looking for employment and mitigating my circumstances during the year long case. I provide monthly documentation to them demonstrating greater than 150 resumes submitted to companies for the various functions within HR.

The case lasted thirteen months and in March of 2005 Agilent Technologies, Inc. was found in violation of USERRA. Me, my family and Colonel Aucoin invested hundreds of hours in time. The out of pocket expense to me and my family exceeded twelve thousand dollars. This financial expenditure was all during a time of unemployment, with limited funds coming from continued Marine Reserve duty, unemployment compensation and an Agilent Severance package. Without a steady income, there was a reluctance to spend money and conserve my assets.

The cost to Agilent Technologies, Inc., which include such items as attorneys fees (defendant and plaintiff), judgments, back pay and interest, not to mention loss in productivity to managers, has been estimated at nearly one million dollars. This is significant in that given the seven month severance they gave me, with an additional one month pay and eight months worth of benefits, they could have kept my services for eight months and fired me for any reason they wanted after my USERRA twelve month reemployment requirement. They chose to specifically fight this cause, spend a significant amount of money, hire a large law firm and fight a single military Veteran while this country was still at war. A billion dollar corporation like Agilent Technologies, can afford to spend a million dollars on a legal issue.

The DOD Ombudsman or the Department of Labor -VETS could have inquired or intervened with any of the above listed items and reasonably determined that information, education, investigation (formal or informal) or mediation would have produced better results.

Final Contact with ESGR

During my case, my final contact with ESGR occurred when I received a call from Fred Fleetmeyer, the Colorado Chairman for the ESGR, sometime during June 2004. This phone call was about seven months after my initial contact with ESGR. For some reason or another he had heard about my situation with Agilent Technologies, and inquired about my current status. I informed him about my conversations with two Ombudsmen from the Colorado organization (the names of which I mentioned to him at the time of this conversation but cannot recall now) and their giving me the phone number and forwarding me to the Department of Labor. He inquired as to my current status and when I mentioned that I had acquired private counsel and filed a case through District court, he stated that the ESGR could not help me and immediately ended the conversation. He neither asked nor suggested any conversation about the problems associated with my initial contact with the Colorado ESGR.

Why I sued Agilent Technologies?

I have been Human Resources professional for 20 years and have been involved with many terminations, suspensions, downsizing, lay-offs, demotions and various employment statuses for which these laws were enacted to protect. Companies and organizations interpret labor laws through their own bias, filters and business needs and will dehumanize the effects based on the bottom line. While many companies share this countries burden of being *at war*, other companies share none.

USERRA as recently redrafted in 1994, is a fairly new labor law for which many companies have little or no experience. It has been my experience in working within both the public and private sectors, that many companies follow the labor laws enacted to protect employees. However, there are still many businesses, organizations, managers and civilians that do not have any idea or care to have any idea what the military member has sacrificed for his country and family. For the most part, the military member has become an inconvenient "Leave of Absence" (LOA) and disruption to their business.

I sued Agilent because they were one of these companies who completely ignored the fact that this country was at war and a war for which they neither acknowledged nor demonstrated any shared responsibility. They also choose to interpret USERRA to meet their own financial needs. THEY BROKE THE LAW.

This company, through its manager Vicki Groninga, went out of its way to fire me after I returned from Operation Iraqi Freedom. Ms Groninga was a manager within Agilent's corporate Human Resources organization with access to corporate counsel and should have known the consequences to violations of federal law. CERTAINLY AFTER MY EMAILS TO HER AND OTHER MANAGERS LAYING OUT THE LAW. It was Groninga who wanted me gone and she used Agilent's rules to fire me. In my opinion, Ms Groninga is one of those civilian managers who does not have any idea or care to have any idea what the military member has sacrificed. THE LAW EXISTS TO PROTECT SERVICE MEN AND WOMEN FROM MANAGERS LIKE THIS.

Agilent Technologies manager was prepared to take whatever steps and provide whatever resources necessary to eliminate my position regardless of USERRA. This case demonstrated the fact that some businesses and organizations are not afraid of USERRA, ESGR, Department of Labor, Department of Justice or Office of Special Counsel. They are fully aware that Reservists and Guard members do not have the time or other resources to fight for their job status changes or lost positions.

Final Thoughts

About two weeks before the case coming to trial, Agilent Technologies, Inc., through their attorney, offered me three hundred and twenty five thousand dollars to settle the case. For reasons stated earlier regarding all the Reservists and Guard Members to follow me and return home, I turned them down. By now it was a firmly entrenched principle and leadership issue. I needed to determine if USERRA had teeth and could protect the rights of all Reservists and Guard Members. I needed to know that organizations who do not share in the responsibility or burden of this country being at war, could not summarily dismiss USERRA as just another labor law.

When I returned from Operation Iraqi Freedom I didn't fully understand the USERRA law. I am not a lawyer but I expected various government agencies like ESGR and the Department of Labor to help me.

The Employer Support for the Guard and Reserves failed me as a returning service member, and failed completely and miserably. They demonstrated absolutely no interest, willingness or desire to educate, intervene or mediate between me and Agilent Technologies, Inc.. It felt as though they were on the side of the large corporations and politically or otherwise did not want to lose the support of big business. For whatever their reasons, as a government agency they offered no support or empathy for my situation and I continued move forward as Marines are trained.

The Department of Labor - VETS, equally failed in their support for a returning Veteran. They never offered or volunteered to investigate my USERRA claim. They offered no comprehensive outreach of any sort nor any education or training. They never offered to mention that a process existed or should be followed. They never reviewed my rights and were quick to dismiss my claim. Again, not being a lawyer, I relied heavily on their counsel and advice.

Following my two deployments since September 11, 2001 and my subsequent termination from Agilent Technologies, Inc. on November 17, 2003, my family and livelihood have been significantly disrupted. Being deployed to a combat zone in defense of your country is difficult, but a situation for which I was trained. Being released from your livelihood after serving your country and getting no support from its government agencies is reprehensible. Either agency (ESGR or DOL - VETS) with minimal investigative effort could have (and should have) easily uncovered the misconduct perpetuated by Agilent Technologies.

Agilent Technologies and their lawyer's, attacked and twisted every part of my character, my past performance, my skills, and my general worth to company to win the case against me. After 19 dedicated years to this company, the company allowed its attorney's to paint me as lazy, unmotivated and questioned my integrity. My wife and three children endured my job loss, the financial strain and this legal challenge against us for fifteen long months.

After Agilent broke the law of USERRA and fired me, I eventually found employment. It was not easy. From November 2003 to June 2005, I submitted well over 200 applications and resumes to various companies for HR positions and received only two face to face interviews. From June 2005 through March 2006 I was deployed to New Orleans with the 4th Marine Division, physically enduring Hurricane Katrina from my assigned post adjacent to the Mississippi River and near downtown New Orleans. From April 2006 to August 2006 I returned to civilian life and was briefly employed by Leprino Foods as a Compensation Specialist. For the past six months I have been and currently employed by the City of Westminster as a Senior Human Resources Analyst continuing my responsibilities as a Generalist and my professional passion for Compensation, Recruitment, Training, Organizational Development and Employee Issues. MY ORDEAL, UNNECESSARY AND ILLEGAL ORDEAL, with AGILENT, has made me and my family much stronger. It has also significantly increased my conviction in that no other Marine, Sailor, Airman, Soldier, Guardsman or any member of our military, ever endure this treatment, especially after dedicated and faithful service to their country. I have gratefully accepted your offer to testify here today, and flew myself out at my own expense, for my brothers and sisters in the military. We need to continue to pursue and defend all USERRA issues as they occur with our returning Reservists and Guard Members, as this law will be meaningless without enforcement. THANK YOU FOR THE OPPORTUNITY TO SPEAK WITH YOU TODAY.

Attachment:

5280 Magazine Article (October 2006)

Nobody's Hero

by Maximillian Potter